

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANGELA K. FOUCH)	
Claimant)	
VS.)	
)	Docket No. 213,537
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent appealed the Award dated September 29, 1997, entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument on March 25, 1998.

APPEARANCES

Jan L. Fisher of Topeka, Kansas, appeared for the claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant injured her back on September 28, 1995. The Administrative Law Judge found a 55.5 percent work disability for the period before October 1, 1996, and a 19 percent work disability after that date. Respondent disagreed with that decision and filed this appeal. Based upon the testimony of two orthopedic specialists, respondent contends claimant neither sustained permanent impairment nor lost the ability to perform any of her past job tasks. Additionally, respondent argues claimant unreasonably refused to work or

seek accommodated work and, therefore, she should be denied a work disability. Claimant, on the other hand, contends the Award should be either affirmed or increased. Nature and extent of disability is the only issue before the Appeals Board on this appeal.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) In August 1989, Angela Fouch, the claimant, began working for the State of Kansas at the Winfield State Hospital and Training Center as a mental retardation technician.
- (2) On September 28, 1995, Ms. Fouch injured her back when she attempted to restrain a patient and was violently and repeatedly kicked in the back, neck, and head. The parties stipulated that Ms. Fouch sustained personal injury by accident arising out of and in the course of her employment with the State. The parties also stipulated that the average weekly wage for this accident is \$458.47.
- (3) Ms. Fouch received conservative treatment for her injury. In January 1996, when she was released to return to work without restrictions, Ms. Fouch reported to the State Hospital and was told there was no work available. The hospital suggested she file for unemployment benefits, which she did.
- (4) In May 1996, Ms. Fouch and her husband moved to Nevada where she continued to look for work. On approximately October 1, 1996, she began working as a residential site manager in a home for six mentally retarded or physically disabled residents. At the time of regular hearing on October 28, 1996, Ms. Fouch was earning \$8.40 per hour.
- (5) One of the treating physicians, board eligible orthopedic surgeon Michelle Ann Klaumann, M.D., saw Ms. Fouch a total of four times in December 1995 and January 1996. She diagnosed a back sprain or contusion. But she did not find objective evidence of permanent functional impairment and on January 29, 1996, released Ms. Fouch to return to work without restrictions. As a part of her treatment, the doctor referred Ms. Fouch for a functional capacity assessment that was performed on January 2, 1996, that indicated Ms. Fouch was functioning in a light-medium physical demand level as defined by the U.S. Department of Labor.
- (6) Board-certified physical medicine and rehabilitation physician Jane K. Drazek, M.D., examined Ms. Fouch at her attorney's request in March 1996. This doctor diagnosed a chronic soft tissue injury as a result of the September 1995 attack and testified Ms. Fouch has a 4 percent whole body functional impairment rating according to both the Third and Fourth Editions of the AMA Guides to the Evaluation of Permanent Impairment due to chronic and persistent back pain. The doctor also believes Ms. Fouch's injury has affected her ability to function:

At this point there is no frank evidence of significant orthopedic or neurologic deficit which would place the patient in a DRE-I category per the AMA Guides

to the Evaluation of Permanent Impairment, Fourth Edition. On the basis of chronic and persistent pain, however, I believe that a 4% permanent partial impairment is appropriate as Mrs.. Fouch's symptoms significantly interfere with daily function.

Although the patient is eager to return to work, I do not feel she would tolerate activities such as bending, twisting, lifting and stooping on other than an occasional basis. I would estimate that she would be poorly tolerant of lifting greater than 40 lbs on an occasional basis and 15-20 lbs on a frequent basis. Constant lifting would be poorly tolerated.

It is noted that a Functional Capacity Evaluation was obtained on January 2nd, 1996, and indicates that Mrs.. Fouch is currently able to function at a light to medium physical demand level. I believe that the lifting restrictions outlined above are consistent with a light to medium physical demand level of activity.

(7) Dr. Drazek reviewed a task list compiled by vocational rehabilitation consultant James T. Molski and indicated Ms. Fouch was unable to perform 3, or possibly 4, of the 18 different work tasks that she had performed during the 15-year period before the September 1995 incident.

(8) At the State's request, board-certified orthopedic surgeon, Robert A. Rawcliffe, Jr., M.D., examined Ms. Fouch in October 1996. As a result of that evaluation, the doctor found no evidence that she had sustained permanent impairment as a result of the work-related attack. He believes Ms. Fouch's persistent pain is caused by her being overweight and having poor muscle tone, which may improve with treatment:

Her persistent pain can best be explained on the basis of overweight and poor muscle tone, and appropriate treatment at this time would include weight reduction, together with postural exercises and also general conditioning exercises.

(9) When Ms. Fouch was released to return to work by Dr. Klaumann, the State was, unfortunately, unable to provide her with a job. Ms. Fouch then made a good faith effort to find appropriate employment.

(10) There is a 100 percent difference in Ms. Fouch's pre- and post-injury wages until October 1, 1996, when she obtained employment, and then that percentage drops to 27 percent.

(11) The Appeals Board adopts the findings set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

The Award should be affirmed.

The Administrative Law Judge was persuaded by Dr. Drazek's testimony and found that Ms. Fouch sustained a permanent injury as a result of the September 1995 attack. The Appeals Board agrees with that conclusion. That conclusion is based upon the findings that Ms. Fouch had a consistent pattern of chronic pain, the apparent lack of symptom magnification, and the functional capacity assessment conducted in January 1996 that contended to confirm Ms. Fouch's reduced physical abilities.

Because hers is an "unscheduled" injury, K.S.A. 44-510e governs the computation of permanent partial disability benefits:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Considering the testimony of Drs. Klaumann, Drazek, and Rawcliffe, the Judge found Ms. Fouch has an 11 percent task loss as a direct result of the September 1995 accident. The Appeals Board agrees and adopts that conclusion as its own.

Because Ms. Fouch did not work after the September 1995 accident until October 1, 1996, the Judge found a 100 percent difference between pre- and post-injury wages for that period. Commencing October 1, 1996, the Judge found a 27 percent wage difference. As indicated above, the Appeals Board agrees with those findings. Also, the Appeals Board agrees with the Judge's conclusion that Ms. Fouch has a 55.5 percent permanent partial general disability until October 1, 1996, and a 19 percent permanent partial general disability commencing that date. Those percentages are derived by averaging the percentage of task loss with the percentage difference in wages as required by statute.

Because Ms. Fouch's permanent partial general disability decreases from 55.5 to 19 percent, the Appeals Board utilizes the computation method approved in Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, __ P.2d __ (1997), to calculate her award. The Appeals Board notes that Ms. Fouch objects to that method.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes dated September 29, 1997, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Angela K. Fouch, and against the respondent, State of Kansas, and its insurance carrier, State Self-Insurance Fund, for an accidental injury which occurred September 28, 1995, and based upon an average weekly wage of \$458.47. For the period from September 28, 1995, through September 30, 1996, claimant is entitled to 14.58 weeks of temporary total disability benefits and 37.99 weeks of permanent partial disability benefits for a 55.5% permanent partial general disability both at \$305.66 per week, or \$16,068.55.

For the period commencing October 1, 1996, claimant is entitled an additional 40.86 weeks of permanent partial disability benefits at \$305.66 per week, or \$12,489.27 for a 19% permanent partial general disability making a total award of \$28,557.82, all of which is due and owing less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka KS
Jeffery R. Brewer, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director